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No. ____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN WHITE,

Petitioner,

v.

BOARD OF TRUSTEES OF WESTERN WYOMING COMMUNITY COLLEGE DISTRICT and MR. RON VOSIKA, in his official capacity as President of the Board of Trustees,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

Statement of the Case

This Petition seeks review of decisions by the Wyoming Supreme Court and the District Court, Third Judicial District, Sweetwater County, Wyoming, both of which sustained termination of Petitioner's teaching contract at Western Wyoming College by that institution's Board of Trustees.

On August 29, 1980, Petitioner was given notice of a recommendation for termination of his contract as an instructor, together with notice of reasons and of his due process rights. On December 12 and 13, 1980, a hearing was held before the Respondent Board of Trustees on the recommendation. On February 12, 1981, Respondents entered "Findings of Fact and Conclusions of Law" set-

ting forth their decision to terminate the Petitioner's teaching contract. Pursuant to Rule 12, Wyoming Rules of Appellate Procedure, and the review provisions of the Wyoming Administrative Procedure Act, Petitioner appealed to the Sweetwater County District Court for review of the Respondents' action. On August 20, 1981, the District Court, Honorable Kenneth G. Hamm presiding, entered its "Order Denying Relief Requested by Petition for Review." The Petitioner filed and served Notice of Appeal to the Wyoming Supreme Court on September 2, 1981.

The opinion of the Wyoming Supreme Court affirming the tribunals below was issued on July 20, 1982. The Court denied a Petition for Rehearing on August 9, 1982.

Petitioner entered into a written contract of employment with the College to serve as an assistant professor of music for the curricular year 1980-1981. The contract provided for Petitioner to be paid a salary of $23,098.00 for the nine-month period beginning August 18, 1980, and ending May 19, 1981.

During the regularly scheduled meeting of the College Board of Trustees in July of 1980, Dr. Bert Slafter, President of that institution, made the following recommendation to the Board:

> "In the best interests of the College, I am recommending the termination of an instructional employee's contract. Knowing that the Board of Trustees is *not* expected to take any action relative to this recommendation at this time, and, acknowledging that I am *not* at liberty to discuss details associated with the recommendation because rights of the individual as well as rights of the institution must be safeguarded, I submit my assurance to the Trustees that appropriate notification of this recom-

> mendation will be tendered to the employee in accordance with college provisions for due process."

Thereafter, on July 25, 1980, President Slafter served a notice of recommended termination upon Petitioner. Included in the notice were the following: (1) Notice to Petitioner of the right to be provided with the names of any and all witnesses against him; and (2) Notice of the right to be provided reasons for the proposed termination of his contract.

On August 12, 1980, Petitioner notified the College in writing that he was requesting a hearing before the Board of Trustees; Petitioner also requested at that time that he be given notice of the reasons for the recommended termination.

In response, Dr. Slafter served upon Petitioner a document entitled "Notice of Reasons for Termination Recommendation and Notice of Hearing," dated August 29, 1980. Included in that notice was the statement of reason for termination which apparently serves as the basis for Petitioner's action in this Court: "Soliciting and participating in relationships with students in a manner which is violative of generally accepted community standards." Included as appendages to the notice were a number of documents, among them eight written statements of policy dealing with possession and use of drugs and alcohol by college students and employees. The Court is invited to note that despite the assertion by Petitioner's counsel in his brief that the sole premise for the above-stated reason was alleged homosexual conduct, no reference whatsoever to any such conduct appears in the letter or the appended documents.

Among the documents given to Petitioner at that time were the following: Policy regarding possession and use of alcohol in residence halls and general use areas; policy

regarding possession and use of alcoholic beverages by persons under the age of 19 years; policy regarding the use of alcoholic beverages on College-supervised property and at College-supervised or sponsored functions; policy regarding use of drugs by school employees; policy regarding use of drugs by students on College-owned or leased property. Clearly contrary to the assertion of Petitioner that he was being charged only with homosexuality, no documents alluding to such conduct were served upon him at that time. Only documents pertaining to alcohol and drug-related behavior were given Petitioner.

No motion for a more definite statement was filed by Petitioner or his counsel prior to hearing. Additionally, as reflected by his comments at the prehearing conference, Petitioner's counsel neither requested the names of witnesses who would testify against his client nor did he interview any witnesses until ten minutes prior to commencement of the hearing. (R., pp. 7, 9, 12, 13, 24.)

Upon conclusion of the hearing, the College Board of Trustees found that Petitioner had furnished to and consumed with students alcohol and marijuana on college sponsored band trips. Some of those students were minors; some were students from a local high school enrolled in an exchange program.

Summary of Argument

The Petition for Writ of Certiorari does not present a federal question.

Neither does the holding of the Wyoming Supreme Court decide an important question of federal law.

The ruling of the Wyoming Supreme Court merely interprets the existing structure for conduct of adminis-

trative hearings which is secured by the statutory law of the State of Wyoming.

A state may regulate the procedure of its administrative agencies in accordance with its own concepts of fairness, and the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.

In this instance, the Wyoming Supreme Court found the notice to Petitioner to contain the minimum specificity required by state procedural provisions and further found that Petitioner failed to avail himself of discovery rights accorded him by said provisions.

Argument

POINT I

A REGULAR COURSE OF ADMINISTRATIVE JUSTICE BY AN EFFICACIOUS REMEDY WAS SECURED TO PETITIONER BY THE LAWS OF THE STATE OF WYOMING.

The Wyoming Administrative Procedure Act, Sections 16-3-101 through 16-3-115, Wyoming Statutes, 1977, republished edition, sets forth the fundamental framework within which due process of law is secured to an individual in a contested case before an agency of the State of Wyoming. More particularly, Section 16-3-107 provides as follows:

> "§ 16-3-107. Contested cases; general procedure.
>
> (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail. Where the indispensable and necessary parties are composed of a large class, the notice shall be served upon a reasonable number thereof as representatives of the class

or by giving notice by publication in the manner specified by the rules or an order of the agency.

(b) The notice shall include a statement of:

(i) The time, place and nature of the hearing;

(ii) The legal authority and jurisdiction under which the hearing is to be held;

(iii) The particular sections of the statutes and rules involved;

(iv) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a more definite and detailed statement shall be furnished.

(c) In all contested cases, depositions and discovery relating thereto, agencies shall have the authority to administer oaths and affirmations, subpoena witnesses and require the production of any books, papers or other documents relevant to material to the inquiry. In case of contumacy or refusal to obey a subpoena issued by the agency in a contested case, deposition or discovery relating thereto, to any person, the district court for the district in which the hearing or deposition or other proceeding is being conducted shall upon application by the agency issue to the person refusing to obey the subpoena an order requiring the person to appear before the agency or other person designated by it there to produce documentary evidence if so ordered or there to give evidence touching the matter in question. Any failure to obey the order of court may be punished by the court as a contempt thereof.

(d) In all contested cases the agency shall as part of its rules of practice provide that the agency or one (1) of its presiding officers designated by it upon

application of any party shall issue a subpoena requiring the appearance of witnesses for the purpose of taking evidence or requiring the production of any books, papers or other documents relevant or material to the inquiry.

(e) The agency upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable and oppressive, or in the event issued pursuant to subsection (g) of this section may condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(f) If a subpoena issued pursuant to this section is disobeyed and if the agency fails to apply pursuant to subsection (c) of this section for enforcement any party may apply to the district court for the district having venue under subsection (c) of this section for an order requiring obeyance of the subpoena.

(g) In all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28 through 37 (excepting Rule 37(b)(1) and 37(b)(2)(D) therefrom) of the Wyoming Rules of Civil Procedure in effect on the date of the enactment of this act and any subsequent rule amendments thereto. All references therein to the "court" shall be deemed to refer to the appropriate "agency"; all references to the use of the subpoena power shall be references to "trial" shall be deemed references to "hearing"; all references to "plaintiff" shall be deemed references to "a party". If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the agency in which the action is pending, the refusal to obey the agency order shall be enforced in the same manner as is provided in subsection (c) of this section.

(h) The agency in a contested case is subject to the discovery provisions of this section but neither the agency, nor any member, officer or employee shall be required to disclose information which is confidential or privileged under the law and no member of the agency shall be compelled to testify or give a deposition in a contested case. Evidence and discovery sought from the agency shall be by written application. If the agency refuses to allow discovery in whole or in part the aggrieved party may apply to the district court for the district in which the hearing, deposition or other proceeding is being or is to be conducted for an order directed to the agency compelling discovery. The court shall enter such order as may be appropriate. The procedure provided for in this subsection for obtaining discovery from the agency is exclusive.

(j) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved. Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel or, if permitted by the agency, by other qualified representative.

(k) Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding in accordance with such rules as the agency prescribes and the pertinent rules of the supreme court of Wyoming. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment or determination of any issue, request or controversy in any proceeding (interlocutory, summary or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that

due regard shall be had for the convenience and necessity of the parties or their representatives.

(sic).

(m) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy of a transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(n) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, contest order or default.

(o) The record in a contested case must include:

(i) All formal or informal notices, pleadings, motions and intermediate rulings;

(ii) Evidence received or considered including matters officially noticed;

(iii) Questions and offers of proof, objections and rulings thereon;

(iv) Any proposed findings and exceptions thereto;

(v) Any opinion, findings, decision or order of the agency and any report by the officer presiding at the hearing.

(p) In all contested cases the proceeding including all testimony shall be reported verbatim stenographically or by any other appropriate means determined by the agency or the officer presiding at the hearing.

(q) Oral proceedings or any part thereof shall be transcribed on request of any party upon payment of the cost thereof.

(r) Findings of fact shall be based exclusively on the evidence and matters officially noticed."

The cited statute clearly secures to those in Petitioner's position herein the minimal due process which this Court has articulated as necessary to insure fundamental fairness under the due process clause of the Fourteenth Amendment to the United States Constitution: It provides for notice of the proceedings against the individual, it provides for notice of the grounds upon which the proceedings are brought; it provides the individual an opportunity to defend himself before a tribunal having jurisdiction of the cause; and it provides for resolution of the controversy in a fundamentally fair manner. *Morgan* v. *United States*, 304 U.S. 1 (1938); *Goss* v. *Lopez*, 419 U.S. 565 (1975); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965); *Schroeder* v. *New York*, 371 U.S. 208 (1962).

POINT II

PETITIONER'S HEARING WAS CONDUCTED ACCORDING TO THE SETTLED COURSE OF PROCEDURE OBTAINING IN THE STATE OF WYOMING AND PETITIONER THEREFORE RAISES AN ISSUE WHICH IS SOLELY A QUESTION OF STATE LAW.

Petitioner attempts to portray as an adjudication of an important federal question the ruling of the Wyoming Supreme Court on the matter of whether the notice of reasons for termination given Petitioner met the standard for specificity contemplated by the Wyoming Administrative Procedure Act.

In fact this Court has ruled on that question repeatedly, and has uniformly held that resolution of that issue is peculiarly one of state law. In general, it has been the position of this Court that the adjudication of an individual's cases by the courts of his own state is due

process of law, that what constitutes due process in a state is governed by the law of the state, and that the requirements of the Fourteenth Amendment are fulfilled if process is had according to the established course of procedure established within the particular state. *Hallinger* v. *Davis*, 146 U.S. 314 (1892); *Arrowsmith* v. *Harmoning*, 118 U.S. 194 (1885); *Walker* v. *Sauvinet*, 92 U.S. 90 (1875); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1916); *Minder* v. *Georgia*, 183 U.S. 559 (1901); *Tinsley* v. *Anderson*, 171 U.S. 101 (1897).

In this instance, the administrative agency and the Wyoming courts have acted in consonance with the laws of the State of Wyoming, having only interpreted and applied local law to a factual question of sufficiency of notice. In such cases, this Court has refused to interfere on the ground that there has been a failure of due process. *Jordan* v. *Massachusetts*, 225 U.S. 167 (1911); *Wilson* v. *North Carolina*, 169 U.S. 586 (1897); *Hovey* v. *Elliott*, 167 U.S. 409 (1896).

It is axiomatic in this Court that a state may regulate the procedure of its courts and agencies in accordance with its own conception of policy and fairness. *Patterson* v. *New Yrok*, 432 U.S. 197 (1977); *Burgett* v. *Texas*, 389 U.S. 109 (1967); *Snyder* v. *Massachusetts*, 291 U.S. 97 (1933); *Dohany* v. *Rogers*, 281 U.S. 362 (1929).

Certainly, the question of what is required by the Wyoming Administrative Procedure Act in the way of notice is within the ambit of local procedure as established by local custom and practice.

The issue presented by the Petition for Writ of Certiorari is not one of federal cognizance. It deals exclusively with the manner in which a state court interprets a state statutory requirement for notice. Only if the

statutory provision is deficient in its notice requirement is a federal question presented. If, on the other hand, the statute is sufficient on its face to meet due process requirements, it follows that application and interpretation of the statute by a state court as a matter of local practice is a local, not a federal, question.

POINT III

THE HOLDING OF THE WYOMING SUPREME COURT WAS FOUNDED UPON A SECOND, AND PURELY, STATE GROUND: PETITIONER'S FAILURE TO AVAIL HIMSELF OF DISCOVERY RIGHTS ACCORDED HIM BY THE WYOMING ADMINISTRATIVE PROCEDURE ACT AND WYOMING RULES OF CIVIL PROCEDURE.

As is made clear by the record and by the observations contained in the majority opinion of the Wyoming Supreme Court, ample opportunity is afforded an individual facing administrative proceedings in Wyoming to utilize discovery in order to understand the case against him.

In this instance Petitioner had the following discovery devices available to him pursuant to the Wyoming Administrative Procedure Act and the Wyoming Rules of Civil Procedure: Request for a more definite statement, request for names of witnesses, request for admissions, interrogatories, deposition and witness interviews. Petitioner utilized none of these. It should also be noted that Petitioner had three and one-half months from giving of original notice until time of hearing in which to avail himself of discovery.

If the notice was vague in its inception, Petitioner had ample opportunity to vitiate the lack of specificity. His failure to do so hardly rises to the status of an important federal question.

CONCLUSION

If there exists, as there clearly did in this case, a state mechanism designed to secure to Petitioner the fundamental elements of procedural due process, the interpretation and application of the statutory mechanism to an individual case by the highest court of that state is purely a subject of state regulation and control and should not be interfered with by this Court.

Whether the notice given Petitioner was sufficiently specific to comply with the state statute requiring notice was a matter of the Wyoming Supreme Court's conception of state policy and fairness.

In any event, putting aside the issue of sufficiency of notice, Petitioner failed absolutely to avail himself of any discovery prior to hearing.

The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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November 1982